No. 50561-4-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

NATHAN SCOTT JOHNSON,

Appellant,

v.

CITY OF TACOMA, DEPARTMENT OF TACOMA PUBLIC UTILITIES, TACOMA RAIL, a municipal corporation,

Respondents.

BRIEF OF APPELLANT JOHNSON

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A. INTRODUCTION

This appeal comes out of a now resolved Federal Employers' Liability Act (FELA) case where a Nathan Johnson lost his leg in an industrial accident. Plaintiff's counsel aggressively and appropriately litigated his case and was successful in obtaining a fair outcome for the injury. Defense counsel for the railroad sought CR 11 sanctions for alleged misconduct by the attorneys in the case; and in particular the trial court found that the attorneys for Mr. Johnson violated CR 11 when it found that Plaintiff's Motion to Amend the Complaint, the Amended Complaint itself and Plaintiff's Motion for Partial Summary Judgment violated that rule.

The ultimate question before the Court is whether Mr. Johnson's attorneys violated CR 11 and failed to undertake a reasonable inquiry into the fact and the law before filing its Plaintiff's Motion to Amend the Complaint, the Amended Complaint itself and Plaintiff's Motion for Partial Summary Judgment pleading. We strongly insist that there is not a factual record that establishes conduct sufficient invoke a CR 11 violation nor does the conduct warrant an attorney fees sanction. Petitioner asserts that each and every one of these pleadings were entirely appropriate, well investigated, well researched motions and pleadings; none were or are CR 11 violations. The trial court abused its discretion in finding otherwise.

Petitioner further asserts that the trial court and opposing counsel denied the sanctioned attorneys due process by failing to provide adequate notice of a CR 11 violation and that the court then afforded the attorneys an inadequate hearing of the issues. The court gave no hearing to the specific conduct that it found objectionable and did not comply with *Lodestar* despite awarding an attorneys' fees sanction against the attorney for $25,528.91. The court's order with respect to the CR 11 sanctions was also inadequate and inconsistent with Washington law, all of which was also denial of due process and an abuse of discretion.

This court should reverse the trial court's erroneous ruling; or alternatively remand the case for further evidentiary hearings and specific findings and a specific order that makes specific findings of fact and makes conclusions of law as required by the law.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

The trial court erred in granting defendant's motion for CR 11 sanctions by its order entered on February 17, 2017

(2) Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion when it found that Plaintiff's counsel violated Washington's CR 11 by filing the Motion to Amend the Complaint, the Amended Complaint itself and Plaintiff's Motion for Partial Summary Judgment in *Johnson v. Tacoma Rail, et al.,* where the sanctioned **a** attorneys conducted a reasonable

inquiry into the facts and the law in anticipation of filing the pleadings and where there was and at alleged that any **filing was plead for an improper purpose (delay, harassment or increasing the costs of litigation).**

2. Does the failure that trial court failed to conduct a reasonable inquiry into the factual basis for the sanction under CR 11, violate the Plaintiff's Due Process.

3. Does the failure of the trial court to conduct a *Lodestar* analysis or hearing where it awards $25,528.91 violate due process and represent an abuse of discretion?

4. Does the refusal of the trial court to issue a precise order require immediate remand to the trial court for an order with include findings of fact regarding; (1) The specific pleading or motion that is in violation; (2) the mitigation (engaged by the attorney) upon notice of the alleged offense (by adverse counsel), (3) the exact timing of the offensive pleading and (4) the precise reasoning behind the specific amount of attorneys fee sanction (and expert fees in this case) is appropriate to the violation, a CR 11 order must include the amount of…attorney fees incurred in responding specifically to the sanctionable conduct

C. STATEMENT OF CASE

This case involved a November 18, 2014 railroad yard switching injury resulting in a lower leg amputation to the petitioner, Nathan Scott Johnson ("Johnson").[1] Mr. Johnson was employed by respondents, City of

[1] Mr. Johnson's case against TACOMA RAIL settled soon before trial in March of 2016 for an undisclosed amount, the issues that are before the Court, were severed and separately appealed.

Tacoma, Department of Tacoma Public Utilities, Tacoma Rail ("Tacoma Rail").[2] The accident happened in Defendant's railroad switching yard.

On the night/early morning of November 17-18, 2014, Mr. Johnson was employed as a "switch supervisor" or "Conductor" by Tacoma Rail. Johnson slipped from a rail car sill step and fell to the ground. At that moment, his left foot was crushed when it was run over by a rail car and resulted in a below-the-knee amputation of his left leg. The liability facts involved mounting and dismounting train cars, and, in particular, his misstep onto a ladder "sill step" mounted on the side of the train car, which was the cause of the accident.

During the case, several negligence theories were investigated and pursued by Plaintiff during litigation. The primary allegation of negligence, which was averred in the first filed complaint, was that the practice itself of mounting and dismounting moving equipment was inherently dangerous and that the company's policy of allowing workers to board train cars while they were still moving was negligent.[3][4] At the

[2] This is a Federal Employers' Liability Act ("FELA") negligence action against Tacoma Rai

[3] In the rail industry, the practice of getting on and off moving equipment, is referred to by the acronym "GOOME."

[4] At the time, no major carriers allowed this practice (now one allows the practice), there is a general (though somewhat disputed) consensus among railroad experts that it is dangerous to for railroads to allow rail employees through their promulgated rules/policies.

time that Mr. Johnson filed his original complaint on December 9, 2015, there were strong suspicions that defective equipment that was in violation of the Federal Safety Appliance Act ("FSAA") was one of the causes of the accident, however, the absence of an adequate quantum evidence to support the allegation of a FSAA violation required its omission from the Plaintiff's original complaint. [5][6] [7]

Through the discovery process Tacoma Rail first produced the subject rail car for inspection on May 3, 2016 when Defendant's expert (Brian Heikkila) and Plaintiff's expert (Alan Riesinger) inspected it. At that time, Defendant's experts did not take a measurement of the sill step. Mr. Reisinger, the Plaintiff's expert, did measure it; and it was his opinion that it was recessed six inches from the outside edge of the rail car. Riesinger Decl.

Following the May 3, 2016 inspection of the rail car, discovery continued, and several other fact witnesses testified. [8] In October of that

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[5] After the accident, there was an investigation of the incident by the Federal Railroad Administration ("FRA"), but it was not possible to secure their investigation reports before initiating this lawsuit. The lawsuit proceeded without a fully developed factual record; nonetheless, there was evidence of negligence, based upon the GOOME policies of Tacoma Rail.

[6] Prior to filing the lawsuit Johnson filed a standard tort claim form disclosing that we suspected an FSAA violation in the equipment that caused or contributed to Plaintiff's injury.

[7] If a piece of equipment is found in violation of the FSAA and it is further found to be a cause of a FELA workplace injury, it is a strict liability situation for the railroad.

[8] Fact witnesses Alan Hardy, Jud Bruton and Dale King were deposed.

year, expert witness and former Federal Railroad Administration Safety Project Coordinator, George Gavalla, reviewed Riesinger's observations and opinion regarding the positioning of the sill step. Based upon this opinion evidence, Gavalla expressed his opinion that there were a number of specific defects in the equipment that caused or contributed to Johnson's injuries. One of the defects, was the then apparent 6" inset of the sill step, which he opined was both a violation of the FSAA (he stated that the sill step was a *per se* violation of the FSAA) and a contributing cause of his injuries. [9][10] Based upon Gavalla's opinion, (October 7, 2016) Mr. Johnson's attorneys asked the attorney for Tacoma Rail for leave to amend the complaint by stipulation (without the need for court order), but Tacoma Rail's counsel would not agree to stipulate to the amendment, and Johnson was obligated to file Plaintiff's Motion to Amend Complaint ("Motion to Amend").[11] The bases for filing the "Amended Complaint" were new facts, and the opinion of Mr. Gavalla, which had been obtained

[9] A safety appliance act violation is a burden shifting finding. If there is a violation the burden shifts to the defense to prove that the defect did not cause the injury.

[10] Gavalla rendered his opinion regarding the sill step on September 23, 2016.

[11] The motion to leave is important because the court awarded attorneys' fees for Tacoma Rail's defense of this motion (even though the defense lost this motion).

in the discovery process. The Motion to Amend Complaint referenced the following newly developed evidence:

> "[the] depositions of NATHAN SCOTT JOHNSON, Alan Hardy, Jud Bruton and Dale King (which recently concluded) and most importantly, the recently rendered opinion of Plaintiff's expert witness George Gavalla."

Motion to Amend Complaint at p. 3.

Judge Vicki Hogan granted Plaintiff's Motion to Amend and on October 14, 2016 Plaintiff's counsel filed his amended complaint.[12] The amended complaint contained numerous allegations regarding the FSAA and other claims, as discussed. One of the claims was that the sill step of the subject car was inset more than 3½ inches, which was a *per se*

3.3 The stirrup steps that Plaintiff attempted to use to mount the rail car on November18, 2014 did not provide secure footing because:

A. The rail car was used in operations that permitted and authorized employees to routinely mount the equipment while the rail car was in motion;

B. The stirrup step Plaintiff used when he attempted to mount the rail car was not equipped with non-skid paint or similar material designed to provide secure footing;

C. The stirrup step rung depth was narrow (approximately two inches) and provided less surface contact area, decreasing the security of the footing on the stirrup step;

D. The stirrup step was used on a car that was wide and tall making it more difficult to mount safely;

E. The stirrup step was recessed into the car, adding to the difficulty of securely mounting;

F. Paint was worn away exposing bare metal on the stirrup step at the normal mounting contact point, which made the stirrup step less secure to use;

violation of the SAA, but there were many other allegations of negligence relating to the faulty equipment otherwise, as well.[13]

After Judge Hogan granted the motion to amend, the amended complaint was filed, the trial date was moved to accommodate additional discovery on the new allegations in the complaint and the case was noted for mediation with Teresa Wakeen. The mediation occurred on December 6, 2017, and the Plaintiff brought a partial summary judgment that was served on the defendants the same day. At the mediation, or soon after, defense counsel presented a photo of the sill step on the subject rail car taken by their expert in May. Counsel, or her expert had applied Adobe Acrobat or Photoshop graphics to the photo, which it was contended was an unambiguous refutation of Reisinger's measurements. Defense expert Brian Heikkila hadn't measured the sill step on May 3, 2016, so on January 3, 2017 (at the time that the motion was filed only Mr. Riesinger had measured the sill step) he returned to the rail car to re-measure the sill step; and since at this point questions were being raised about the reliability of Mr. Riesinger's measurements, Plaintiff retained a mechanical engineer named Ken Blundel, Ph.D to measure the railcar's

[13] There were also violations of the SAA that were jury questions regarding the lack of a "secure" sill step (*see* portions of Amended Complaint *infra e.g.* lack of non-skid, narrow rung depth and worn paint on the sill step), these were not the subject of Plaintiff's Partial Summary Judgment.

sill step again to verify (or refute as it were) Riesinger's measurements. He accompanied Mr. Heikkila and who videotaped the measurements, when they took place in St. Louis on January 3, 2017. Both Dr. Blundel and Mr. Heikkila stated that Riesinger's measurements appeared to them to be inaccurate (January 3, 2017). Consequently, when counsel for Tacoma Rail requested on January 4, 2017 that the Plaintiff's motion for partial summary judgment be stricken, the court agreed (January 6, 2017). [14] The other broad allegations of FSAA violations and the other allegations in the amended complaint remained viable.

January 16, 2017, the railroad attorney provided notice that she felt Plaintiff's Amended Complaint was a violation of CR 11 and threatened to seek sanctions and bring a partial summary judgment motion. Plaintiff refused to strike the broad allegations in the amended complaint, since they had many other allegations that were jury questions that were not dependent upon Riesinger's measurements. Defense counsel was told to bring the summary judgment motion, which it did along with sought CR 11 sanctions.

On February 17, 2017, the trial court granted Defendant's partial summary judgment motion, granted its motion for CR 11 sanctions and

[14] None of the legal work or expert opinion evidence was developed or undertaken after notice was provided to Plaintiffs to defend the summary judgment motion.

awarded all of the attorneys' fees and all of the expert fees for all of the legal work and expert work performed on the case from October 7, 2016 to the date of the hearing on February 17, 2017, $ 25,528.91. The order states only the following (and nothing more) regarding CR 11 sanctions "**[this] court additionally grants Defendant's request for CR 11 Sanctions and awards Defendants $25,528.91.**". Plaintiff's counsel, George Thornton asked to be heard on the CR 11 sanctions:

> MR. THORNTON: I will, but I think with respect to the timing of these things, I don't know when the Court is suggesting that we should have withdrawn our motion. We didn't get the information on which to base this until after the inspection results in January and that's what those inspections were for.
>
> MS. DICKERSON: The total I came up with was $25,518.91.
>
> MS. DICKERSON: $18.91.
>
> THE COURT: Just to make the record complete, I believe the numbers I gave -- $10,465 in attorney fees with the two defense expert billings that I've already read into the record, are those the ones that add up to the 25?
>
> MS. DICKERSON: Yes, Your Honor. THE COURT: I haven't pulled out the calculator, but I believe I have read into the record the basis for the amount. I've signed the order.
>
> MR. THORNTON: **Your Honor, can I be heard on this briefly**?
>
> THE COURT: **Counsel, you can file a motion to reconsider**.

Plaintiff sought reconsideration of the order, or in the alternative a clarified order; but when on March 10, 2017 the court held a hearing on

Plaintiff's motion for reconsideration, the court simply refused to provide specific findings of fact or clarify its ruling from the February 17, 2017 hearing:

> MR. HERSCHENSOHN: Your Honor, I have a -- there is two parts of this motion. Obviously, there's the motion to reconsider and then the request for a more specific order; and I have prepared a proposed order, I provided to Counsel, that provides more specificity so that we can know which pleadings that we're not compliant with CR 11 and when the timing of those things took place. And I'm just presenting this and making it a part of the record.
>
> THE COURT: The Court made its ruling. **There is a record already made. I'm not inclined to go back after the February 17th date to make specific findings.**
>
> MR. HERSCHENSOHN: Okay. And there is, you know, obviously, support **in [MacDonald v. Korum Ford 912 P. 2d 1052 (1996)] for an order, and in many of the cases that I cited, for a specific order that pertains specifically to the particular pleadings which is not something that we found here**.
>
> THE COURT: Counsel, I don't see how you can prepare specific findings when you haven't even reviewed the hearing by way of a court transcript to prepare those; so I'm not inclined to sign them.
>
> MR. HERSCHENSOHN: Okay. So I would propose that on a motion for summary judgment, the pleadings are, primarily, the thing that goes up on appeal. Thank you, Your Honor.

D. SUMMARY OF ARGUMENT

Mr. Johnson's counsel never violated CR 11. The trial court abused its discretion when it found violations of that rule. All the

pleadings were entirely appropriate, well drafted and based on strong evidence; some were even approved by another trial judge.

The motion to amend the complaint, the amended complaint itself and the motion for partial summary judgment were all apparently subjected to CR 11, but all perfectly reasonable pleadings to file at the time.[15] [16] It is only with the benefit of hindsight that a factual basis for any of the foregoing pleadings could be proven deficient. These filings are not a proper basis for imposing CR 11 sanctions, and the court's finding in this regard is an abuse of discretion.

The court abused its discretion when it made findings based upon a misapplication of the law. The judge made findings of **bad faith** at the February 17, 2017 hearing. This is the wrong legal standard.[17] The application of the wrong legal standard is an abuse of discretion and the denial of the opportunity to allow for a hearing on the appropriate law is a

[15] The Motion to Amend the Complaint (based upon the fact that fees were awarded to the defendant for the time expended by the defendant defending the motion); this finding by the trial court is presumptively unreasonable and an abuse of discretion since the motion to amend the complaint was a motion that the defendant lost. This is a trip down the rabbit hole indeed; a finding of CR 11 violation where the court upheld the motion presumably implicates the previous trial judge who granted the motion under the rule.

[16] The Amended Complaint was approved by Judge Hogan, which is strong evidence that the pleading was neither baseless nor frivolous.

[17] Both the ninth circuit and Washington State have rejected the good faith/bad faith standard (the ninth circuit in 1989 [17] and Washington State in 1990[17]). Accordingly, sanctions may only be properly imposed if the attorney's conduct is objectively unreasonable, whether or not it was in good or bad faith.

violation of due process. Both warrant vacation of the court's findings of a CR 11 violation and the imposition of sanctions.

Serious due process issues are raised by the conduct of the court and the conduct of counsel.

One was the conduct of opposing counsel because where the sanctioned attorney had insufficient notice or opportunity to defend their tactics, or to mitigate the harm caused by the alleged misconduct, this is a denial of due process. The award of expert fees and the great proportion of the attorneys' fees were incurred before any notice of a perceived violation of CR 11 was communicated by Tacoma Rail's counsel to Mr. Johnson's attorneys and this was a denial of due process.

The second was the court's failure to provide the Plaintiff with due process at the respective hearings. At hearing the trial court did not allow any hearing on the factual and legal basis upon which sanctions were awarded. During the first hearing on February 17, 2017, the court shut down George Thornton's efforts to make a record and to clarify the findings of the court with respect to the timing of the CR 11 and the basis for the award of attorneys' fees. The court likewise refused to allow for any further inquiry at the hearing on motion for reconsideration. The absence of a hearing on the timing of the violations, and on the basis for

the monetary amounts of attorneys' fees (*e.g. Lodestar*) denied the sanctioned attorneys due process.

Due process requires that the court provide the appropriate order from which an appeal can be pursued. There is express case law which requires such an order when a trial court finds CR 11 sanctions are awarded; and despite repeated requests for such and order, one with 1) the specific pleading or motion that is in violation, (2) mitigation upon notice of the offense, (3) the timing of the offense and (4) why the amount of attorney's fee sanction is appropriate to the violation. The court's refusal to issue such an order is a denial of due process.

The purpose of CR 11 sanctions is to deter truly bad conduct by attorneys; it is not intended to create a cottage industry for lawyers. There is no support under Washington or federal law to support imposing a fee shifting regime under CR 11. This is precisely what the court did here and it is a misapplication of the law and an abuse of discretion.

Attorneys are supposed to take risks on behalf of their clients; they are supposed to push the envelope. The fact that the court personally sanctioned the attorneys over $25,528.91 for an apparent evidentiary shortcoming or perhaps mistake of an expert witness is *prima facie* evidence of an abuse of discretion; or a profound misunderstanding or misapplication of the law.

E. ARGUMENT

(1) Standard of Review

The standard of review is abuse of discretion; this has been the case in Washington since *Cooter v. Gell v. Hartmarx.*[18] In that case, the Supreme Court laid out with considerable detail the proper analysis for applying this standard in the context of CR 11:

> [The abuse of discretion standard] would not preclude the appellate court's correction of a district court's legal errors [where a] materially incorrect view of the relevant law [has been applied] in determining that a pleading was not "warranted by existing law or a good faith argument" for changing the law. [Appellate courts are] justified in concluding that, in making such errors, the district court abused its discretion. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard*v. *Swint, supra*, at 287. See also *Icicle Seafoods, Inc.* v. *Worthington*, 475 U. S. 709, 714 (1986).
>
> *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 403; 110 S.Ct. 2447 (1990).

Whereas the decision to impose sanctions under CR 11 is within the **sound** discretion of the trial court, the court cannot **abuse** its discretion. *State ex. Rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). But, a court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 844, 912 P.2d 1052 (1996). Applying the

[18] 110 S.Ct. 2447 (1990)

wrong legal standard is an abuse of discretion. *Mayer v. Sto Indus, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

(2) Background on the Law Applicable for CR 11 Sacntions

(a) Legal Causation.

CR 11 requires the attorney to undertake a reasonable inquiry into the fact and the law before filing a complaint or other pleading. *Harrington v. Pailthorp*, 67 Wn.App. 901, 841 P.2d 1258 (1992), review denied, 121 Wn.2d 1008, 854 P.2d 41 (1993).

> CR 11 is not a mechanism for providing attorneys' fees to a prevailing party where such fees would otherwise be unavailable. ***Bryant v. Joseph Tree, Inc.***, 119 Wn.2d. 210, 218, 829 P.2d 1099 (1992)

Most critical to the analysis here the Supreme Court has stated that the "'[inquiry is] what [the filing attorney believed] at the time the pleading, motion or legal memorandum was submitted.'" *Id*. (quoting *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 225, 829 P.2d 1099 (1992)). Sanction is inappropriate where errors or deficiencies in the offensive pleading are subsequently proved to be wrong discovery or factual information that was not available at the time the pleading was filed. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. at 112, 780 P2d at 857.

CR 11 requires the attorney to undertake a reasonable inquiry into the fact and the law before filing a complaint or other pleading. *Harrington v. Pailthorp*, 67 Wn.App. 901, 841 P.2d 1258 (1992), review denied, 121 Wn.2d 1008, 854 P.2d 41 (1993) Washington courts apply an objective standard for the basis for the pleading in law and fact to evaluate compliance with CR 11. *Bryant*, 119 Wn.2d at 220. The analysis is what the attorney knew at the time of filing, it is an objective "reasonableness under the circumstances," facts that are discovered subsequently does not figure in the analysis.[19]

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.

Bryant at 220 citing Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199.

> CR 11 sanctions require the following criteria to be met:
>
> 1. The attorney must have failed to conduct a reasonable inquiry into the facts supporting the paper;
> 2. Attorney failed reasonable inquiry into the law to ensure that the pleading is warranted by existing, or for a good faith argument for the extension, modification, or reversal of existing law; and

[19] The operative question is what was known at the time of the filing. Cascade *Brigade v. Economic Dev. Dd. For Tacoma-Pierce County*, 61 Wn. App. 615, 620, 811 P.2d 697 (1991).

> 3. The attorney must have filed the pleading for an improper purpose, such as delay, harassment or increasing the costs of litigation.

Miller, 51 Wn. App. 285, 300

CR 11 sanctions should not be imposed where the lawyer's client was ultimately not credible, where the facts change, or where witnesses subsequently recant. See *Id*. (citing *Mar Oil, SA v. Morrisey*, 982 F.2d 830, 844 (2d Cir. 1993). A CR 11 violation that warrants a sanction exists only where it is **patently clear that that the filing has no chance of success at the time of filing**; every doubt should be resolved in favor of the attorney signing the filing. *E.g. Salvador* 145 Wn. App. at 404.

CR 11 is for circumstances "where it is patently clear that a claim has absolutely no chance of success [and courts] 'must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer." *Salvador* at 404 (quoting *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 122, 780 P.2d 853 (1989) (additional internal quotation omitted)).

Likewise, CR 11 sanctions are not warranted simply because an action's factual basis proves deficient or a party's view of the law is incorrect. *E.g. Roeber v. Dowty Aerospace* Yakima,

116 Wn. App. 127, 141-42, 64 P.3d 691 (2003). (Summary judgment of dismissal of plaintiff's claim affirmed and trial court's refusal to grant CR 11 sanctions affirmed because: "Although ultimately unsuccessful, [plaintiffs'] complaint was not totally without basis in law or fact." *Id*.)

b. Due Process Requirement (Notice and Proper Hearing and need for clear findings)

a. Sufficient Hearing

The federal advisory committee note to Rule 11 provides that **CR 11** procedures "obviously must comport with due process requirements." Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 201. Due process requires notice and an opportunity to be heard before a governmental deprivation of a property interest. *Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc.*, 834 F.2d 833, 835 (9th Cir.1987) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971)).

Bryant v. Joseph Tree at 224

Due process is a necessary prerequisite to sanction proper issuance of the order, if a court is inclined to find an CR 11 violation, it should issue a show cause order and allow the lawyer subject to the potential prospective sanctions to respond. In this context, the Defendant's allegations regarding CR 11 have been ambiguous at best, citing the Plaintiff's motion for partial summary judgment

of November 15, 2016 when it had already been stricken well in advance of the instant motion and alternatively shifting to other pleadings, including the Amended Complaint, which was approved pre-filing by Edmond Murphy. Specificity is necessary for the attorney who is charged with a CR 11 violation so that he or she may have due process. *See* *Biggs v. Vail*, 124 Wash.2d 193, 201, 876 P.2d 448 (1994) (Biggs II).

As discussed herein the question of whether a CR 11 violation has occurred invokes the *reasonable attorney* standard subject pleading or motion at the time of filing. Experts are routinely used to ascertain the reasonableness of conduct when it is the subject of dispute before a tribunal. It is appropriate to allow the attorney who is subject to sanctions under CR 11 to submit declarations to establish that a reasonable inquiry took place and that the attorney's actions were reasonable under the circumstances. *See e.g. Meuller v. Miller*, 82 Wn. App. 604, 917 P.2 604, FN 9 (1996). In support of this motion for reconsideration of this Court's order, we submit the declaration of Leland G. Ripley, the former chief disciplinary counsel for the

Washington State bar association who offers his expert analysis of the two potential pleadings that might be subject to CR 11 in this case.

Need for hearing on appropriateness of attorneys' fees. Awards of attorneys' fees in Washington require calculation using the *lodestar* method. *See* *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (where a rule or statute doesn't dictate some other methodology for calculation *lodestar* applies); *see also* *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993).[20]

b. Sufficiency of Notice

Under CR 11, the complaining attorney must notify opposing counsel of the objectionable pleading immediately, upon perceiving a violation of the rule; lack of proper notice obviates any claim for subsequent attorneys' fees under CR 11. *Biggs v. Vail* 119 Wn.2d 198 n.2, 830 P.2d 350 (1992). Washington's CR 11 mirrors the

[20] *Lodestar* requires the court to determine a reasonable hourly rate by the number of hours reasonably expended on the matter-an award of attorney's fees must determine not only the time spent and the reasonableness of the hourly rate (skill of the attorney (determining the reasonableness of the hourly rate); reputation of the attorney, skill required to do the work). ***Id.***

federal rule, Washington courts will look to the federal rules for guidance on its application. *Biggs* at 198.n.2 [21] Prompt notice regarding the violation is required, so that the attorney who filed the pleading can withdraw the offensive pleading. *Biggs supra* at 124 Wn.2d. at 198 n.2.

> A party seeking **CR 11** sanctions should therefore give notice to the court and the offending party promptly upon discovering a basis for doing so. Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 200.

Bryant v. Joseph Tree at 224

The notice requirement exists in the interest of avoiding satellite litigation on the point of CR 11 violation "a party resisting a motion that violates CR 11 has a duty to mitigate and may not recover excessive expenditures." The requirement for notice hopes to avoid a need for hearing or the imposition of sanctions, CR 11 has never been intended as a fee shifting rule; fees.[22] And, when

[21] The counterpart federal rule affords a party a 21-day safe harbor period during with the challenged pleadings may be withdrawn. F.R. Civ. Pro. 11(c)(1)(A) an application of the federal safe harbor rule in this case would preclude any imposition of sanctions in this case, which is at least one of many reasons why this ruling is an outrageous abuse of discretion.

[22] Absent explicit legislative authority or contract, the so called "American Rule" applies to attorney's fees in Washington. Attorney's fees are not warranted simply because one side prevails on the facts or the law. In Washington and elsewhere, the parties pay their own legal and litigation expenses. *See e.g.* *Dayton v. Farmers Insurance Group*, 124 Wash.2d 277, 280,876 P.2d 896 (1994).

attorney fees are awarded as sanctions, the trial court must limit those fees to the amounts reasonably expended in responding to the improper pleadings. *MacDonald*, 80 Wn. App. at 891.

When an attorney perceives a CR 11 violation, the attorney needs to promptly notify opposing counsel of the perceived violation, so that the attorney who filed the pleading can withdraw the offensive pleading and mitigate his potential sanction if the court is inclined to grant the motion. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996).

CR 11 is not a Monday morning quarterback rule, as stated in *Bryant v. Joseph Tree*, "the reasonableness of the inquiry is evaluated by an objective standard at the time the pleading is filed." *Id* at 119 Wn.2d 220, citing *Miller v. Badgley*, 51 Wn. App. 285, 299, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). The *Bryant* court went on to state the standard:

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.

Bryant at 220

Notice from the attorney must be precise and arrive before the attorney's fees are incurred since "those fees amounts

expended responding to the sanctionable findings." *Biggs II* at 201. The law is not in dispute on this point.

c. Clear Unambiguous Written Order with Specific Findings (Fact and Law)

Washington appellate courts have spoken to the precision required of court ordered CR 11 sanctions. *Biggs II* at 193. *MacDonald v. Korum Ford* at 877. A CR 11 order must include findings of fact, (1) including the specific pleading or motion that is in violation, (2) mitigation upon notice of the offense, (3) the timing of the offense and (4) why the amount of attorneys fee sanction is appropriate to the violation, a CR 11 order must "include the amount of…attorney fees incurred in responding specifically to the sanctionable conduct." *Biggs II* at 201. The absence of a proper order will require a remand to the trial court for a more precise order. *See Just Dirt Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007); *see also Blair v. GIM Corp. Inc.*, 88 Wn. App. 475, 945 P.2d 1149 (1997).

(3) Legal Standard for CR 1 Sanctions

(a) Abuse of Discretion

Court Applied a Materially Incorrect Interpretation of Law

In the first instance, the court here made a legal error since its findings of bad faith represent a materially incorrect view of the

material law. On February 17, 2017 the court stated "I am finding that **good faith isn't shown by Plaintiff's counsel on this issue**. CR 11 sanctions do, seem appropriate, and will be ordered…" In recognition of Cooter & Gell, the good faith/bad faith analysis hasn't been the standard in Washington since 1992, *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d. 210, 218, 829 P.2d 1099 (1992). Washington applies the objective standard, the law and fact available at time of filing a "reasonableness under the circumstances," standard. *Bryant* at 220 citing Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. at 199; see also, *Cascade Brigade v. Economic Dev. Dd. For Tacoma-Pierce County*, 61 Wn. App. 615, 620, 811 P.2d 697 (1991). The evaluation of whether sanctions are warranted is reasonableness of the respective attorneys' level of pre-filing investigation at the time the pleadings were filed. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). As discussed, infra, applying the wrong legal standard is an abuse of discretion. Mayer v. Sto Indus, Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

(b) None of the "offensive pleadings" Warrant the Imposition of Sanctions Under CR 11

As outlined *infra*, A CR 11 violation that warrants a sanction exists only where it is patently clear that that the filing has no chance of

success at the time of filing; every doubt should be resolved in favor of the attorney signing the filing. *E.g. Salvador* 145 Wn. App. at 404. Here, the facts support the filing of every single pleading which might be the subject of sanctions.

The first pleading for which a CR 11 violation was found and for which attorneys' fees were granted was Plaintiff's Motion to Amend the Complaint.[23] The record is ambiguous on whether this pleading was considered a violation of CR 11. That Vicky Hogan granted this motion, *ipso facto* demonstrates that motion was not frivolous and, by the same logic, the fees awarded by the court for unsuccessfully defending the motion are similarly unwarranted; an unreasonable and untenable ruling and an abuse of discretion.

The second pleading at issue is the Amended Complaint, which was signed on October 14, 2016. The record shows evidence that the Amended Complaint was filed by plaintiff only after the facts that supported amending the complaint were developed. Notably, the amended complaint never listed several objective factors that

[23] In light of the absence of a clear record from the hearings and the absence of an order delineating the precise pleadings that were in violation of CR we are not 100% sure which pleadings constituted a violation. Here we deduce from the fact that the attorney fees award included the time which the opposing counsel spent opposing plaintiff's Motion to Amend the Complaint that this pleading was a violation.

demonstrated that there was a basis for this claim that didn't involve the specific administrative/legal issues that related to the SAA violation, *e.g.* the sill step lacked non-skid paint, the sill step was wide and tall, the paint on the sill step was worn away, and the sill step was narrow.[24] These allegations when combined with the amended complaint's other allegations provided an objectively reasonable basis to amend the complaint. Indeed, the amended complaint did not allege any specific C.F.R. violations but simply provided facts that gave the defendants adequate notice of the nature of the claims plaintiff would

[24] 3.2 The Defendant provided a railroad car in violation of the Federal Safety Appliance Act, 49 U.S.C. §20301, et seq., in that the car was equipped with stirrup steps that did not provide secure footing for its operating crew, including Plaintiff, given the operational practices and working conditions in use at the time of the accident.

3.3 The stirrup steps that Plaintiff attempted to use to mount the rail car on November18, 2014 did not provide secure footing because:
A. The rail car was used in operations that permitted and authorized employees to routinely mount the equipment while the rail car was in motion;
B. The stirrup step Plaintiff used when he attempted to mount the rail car was not equipped with non-skid paint or similar material designed to provide secure footing;
C. The stirrup step rung depth was narrow (approximately two inches) and provided less surface contact area, decreasing the security of the footing on the stirrup step;
D. The stirrup step was used on a car that was wide and tall making it more difficult to mount safely;
E. The stirrup step was recessed into the car, adding to the difficulty of securely mounting;
F. Paint was worn away exposing bare metal on the stirrup step at the normal mounting contact point, which made the stirrup step less secure to use;
G. The stirrup step was mounted at approximately 30 inches above normal ground walking surfaces, requiring any person mounting the rail car to significantly elevate their leg in order to reach the stirrup step, thus adding to the insecurity of the stirrup step; and
H. The width of the stirrup step was narrow (approximately 15 inches), presenting a narrow and insecure target for mounting the rail car.

pursue. Alan Reisinger's Declaration and opinion of former FRA safety expert George Gavalla alone supported a *prima facie* claim for a violation of the Federal Safety Appliance Act (FSAA). Furthermore, the obvious fact that the fact that a judge approved filing the amended complaint is evidence that the pleading was neither baseless nor frivolous, CR 11 sanctions for a pleading where there is judge approval is strong evidence that the ruling is predicated upon unreasonable and untenable grounds. See *Macdonld v. Korum Ford* at 844.

The third pleading that was found to be in violation of CR 11 was plaintiff's partial summary judgment motion signed by attorney Zachary Herschensohn and filed on December 7, 2016. This motion was based upon the sworn testimony of George Gavalla and Alan Reisinger, whose expert opinion demonstrated an unambiguous *per se* violation of the FSAA stated that the subject sill step of the train car was in violation of the C.F.R's that governed the rail car involved in the accident. On an objective basis, the standard found *inter alia* in *Bryant v. Joseph Tree, Inc. Salvador v. Momah; and Roeber v. Dowty Aerospace* Yakima, the motion filed by Zachary Herschensohn was well taken based upon the facts known at that time; specifically, that

there was no evidence that Riesinger was wrong in his measurement.[25] Measurements contradicted Mr. Riesinger's May 2, 2016 measurements did not exist until January 3, 2017 (three days before the summary judgment was withdrawn).[26] The fact that a CR 11 violation was found where the plaintiff withdrew the motion as soon as the factual predicate for the motion deteriorated is strong evidence that the courts CR 11 ruling is based upon unreasonable and untenable grounds. See *Macdonld v. Korum Ford* at 844

Given that all litigators routinely rely upon testifying experts in formulating legal arguments, it is presumptively reasonable for Mr. Herschensohn to have relied upon an opinion that was uncontradicted alternative measurements—a measurement is an opinion, an expert opinion is evidence. That evidence fails to stand up well on at trial, on cross-examination (in deposition) does not mean that the lawyer has acted unreasonably by relying upon it, it goes to the weight of the evidence. The mere fact that a claim ultimately does not prevail is not

[25] Measurements taken on January 4, 2017 showed that Mr. Reisinger may have made a mistake in his earlier measurements.

[26] The trial court appeared to believe, in error, that the plaintiff had contradicted a SAA violation in May of 2016, "Now I have a date that neither of you addressed which was May 2nd, 2016" in its later pronouncements the court appeared to believe (in error) that the plaintiff knew that the sill step was compliant with the SAA but filed a summary judgment anyway, which is a material error. The court states "Plaintiff was put on notice regarding the sill step being within the four to six inches early on in regards to their claim in this case."

alone a basis for imposing CR 11 sanctions. It has been noted elsewhere that "only when it is patently clear that a claim has absolutely no chance of success [should CR 11 sanctions be imposed]." *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). The motion for Partial Summary Judgment was entirely reasonably and based upon plaintiff's experts' opinion (including the measurements). The fact that defendants' experts dispute these measurements does not constitute a CR 11 violation. These are the usual disagreements between experts. Because it was based upon expert opinion, this motion was not and never could have been a CR 11 violation. It was reasonable and had a valid evidentiary basis. The trial court's finding that the reliance upon experts opinion evidence that is later undermined by further discovery, is untenable and unreasonable; an abuse of discretion.

(c) Trial Court Denied Counsel Due Process

Absence of Adequate Hearing on Timing, Conduct, Notice and *Lodestar*

The trial court failed to provide the attorneys with due process. The touchstone of due process is the opportunity to be heard. At the hearing that took place on February 17, 2017 the court did not allow a proper evidentiary hearing on the factual and legal basis upon which sanctions

were awarded. As discussed herein the question of whether a CR 11 violation took place is the *reasonable attorney* standard subject pleading or motion at the time of filing. The court's hearing on February 17, 2017 was inadequate to satisfy minimal due process:

> THE COURT: As I've indicated, I've read the pleadings and Plaintiff was put on notice regarding the sill step being within the four to six inches early on in regards to their claim in this case. There appears to have been, based on the pleadings, communications made between the defense and Plaintiffs regarding striking that claim after information came about regarding this sill step and there not being any facts in dispute -- I know Plaintiff's counsel disagrees with that statement, but there were no facts in dispute in regards to the dimensions in question here. Plaintiff's counsel failed to address that issue which warranted the defense to take actions that incurred a substantial amount of fees -- and substantial is relative, but fees in order to respond to Plaintiff's claim. I am finding that good faith isn't shown by Plaintiff's counsel on this issue. CR 11 sanctions do, in fact, seem appropriate and will be ordered. Anything else, counsels?

The absence of a hearing on the precise what and when of the sanction, and on the amount and basis for the award of many thousands of dollars in attorneys' fees, was a denial of due process. The fact that the court applied the antiquated pre-1983 good faith/bad faith analysis, and failed to conduct an evaluation of the reasonableness of the pleadings is also denial of due process. It is well established that a court must conduct a reasonable inquiry to determine whether the attorney's actions were reasonable under the circumstances and this was never done. *See e.g. Meuller v. Miller*, 82 Wn. App. 604, 917 P.2 604, FN 9 (1996). In order for a court to properly find CR 11 violation there must be an evidentiary

hearing that determines that the attorney failed to conduct a reasonable inquiry into the facts or the law, this wasn't done by the trial court, which is a denial of due process.

"Both practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted." Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). The notice requirement exists to give fair warning to pleading violators and to deter violations as early as possible. Biggs, 124 Wn.2d at 198. But proper notice of possible CR 11 sanctions must be meaningful. "[W]ithout prompt notice regarding a potential violation of the rule, the offending party is given no opportunity to mitigate the sanction by amending or withdrawing the offending paper." Biggs, 124 Wn.2d at 198. Otherwise, CR 11 would be "simply another weapon in the litigator's arsenal." Biggs, 124 Wn.2d at 199 n.2. Absent meaningful notice, an untimely CR 11 motion is impermissible. See, e.g., North Coast Elec. Co. v. Selig, 136 Wn. App. 636, 649-50, 151 P.3d 211 (2007). Notice must identify with specificity the perceived violation, a blanket assertion of a CR 11 violation is not sufficient to impose a sanction.

In this case the defendant did not provide adequate notice of a CR 11 violation. On each of the potential pleadings, save a broad claim

regarding the amended complaint, there was never any notice of a CR 11. The demand to dismiss every claim in the amended complaint fails to provide sufficient specificity to allow action on the part of the attorney.

The timing of the notice is a prerequisite factual determination to a CR 11 violation, the timing of the notice is the point from which hypothetical fees begin to run, and under Washington law, CR 11 violations cannot be properly imposed without making this determination. Plaintiff's counsel asked to be heard on these points and was denied due process MR. THORNTON: **Your Honor, can I be heard on this briefly**? THE COURT: **Counsel, you can file a motion to reconsider**. Throughout, trial court simply refused made no determination as to when counsel was notified of the (alleged) violations of CR 11 and made no cogent evaluation of what efforts were engaged by the defendant to provide notice. When counsel filed a motion for reconsideration, this issue was brought to the court's attention again on March 10, 2017:

> MR. HERSCHENSOHN: … The whole idea with CR 11 sanctions is to prevent -- you know, to proactively or prophylactic -- take a prophylactic measure to prevent the need for the attorneys to appear before the Court and have an attorney's fees sanction. That whole idea is: "Okay. Look, Counsel, this is a CR 11 violation. Okay." And then I get to withdraw my pleadings, so I don't have to pay the bill for them to oppose the motion. I mean, it's all about notice; and the notice in this case was brought to the attention of the attorneys, and it was promptly withdrawn. And so, you know, on that point, I would simply say that, look, even if the Court is inclined to find there were CR 11 violations on December 6th that we withdrew those pleadings as soon as we were notified of any sort of seeking of sanctions, not even --

> there was no specific CR 11 violation, no allegation that that was a CR 11 violation when it was provided to us on the 4th; but we, nonetheless, withdrew that. So, given the timing of that and the rulings that the Courts have indicated with regard to the obligation to specify the sanction and say, "withdraw the pleading," that the attorney's fees are not appropriate since the notice comes after those fees were incurred and the expert fees….

The court refused, but on February 17 and the subsequent March 10 hearing to conduct a proper hearing on the timing. Notice must be provided before the attorney's fees are incurred since it is only "those fees amounts expended responding to the sanctionable findings," which can be properly awarded. *Biggs II* at 201. Likewise, the court failed to conduct an evaluation of what fees were appropriate under the *Lodestar* standard.

Washington uses the Lodestar method for calculating fees. *Lodestar* requires the court to determine a reasonable hourly rate by the number of hours reasonably expended on the matter-an award of attorney's fees must determine not only the time spent and the reasonableness of the hourly rate (skill of the attorney (determining the reasonableness of the hourly rate); reputation of the attorney, skill required to do the work). No hearing was conducted applying regarding a lodestar analysis to determine whether the fees were appropriate. *See* *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) (where a rule or statute doesn't dictate some other methodology for calculation

lodestar applies); *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993).

The courts failure to conduct this inquiry was a denial of due process; the hearings on February 17 and the subsequent March 10 hearing did not include even an abbreviated *Lodestar* hearing. If the court had engaged the *Lodestar* methodology and conducted a proper hearing, it would have *ipso facto* had to have determined the reasonable number of hours which were necessary to obtain the desired results, exclude wasteful, duplicative or unsuccessful legal work; a hearing which would, by necessity have satisfied the other due process requirements, but it refused do conduct such a hearing.

(d) Inadequacy of Court's Written Order

Washington law is clear. When a CR 11 violation is found by a court, and when fees are awarded, the trial court is required to issue a clear unambiguous written order. This wasn't done in this case. Washington appellate courts have spoken to the precision required of court ordered CR 11 sanctions. *Biggs II* at 193. *MacDonald v. Korum Ford* at 877. A CR 11 order must include findings of fact, (1) including the specific pleading or motion that is in violation, (2) mitigation upon notice of the offense, (3) the timing of the offense and (4) why the amount of attorney's fee sanction is appropriate to the violation, a CR 11 order must "include the

amount of…attorney's fees incurred in responding specifically to the sanctionable conduct." *Biggs II* at 201. The absence of a proper order will require a remand to the trial court for a more precise order. *See Just Dirt Inc. v. Knight Excavating, Inc*., 138 Wn. App. 409, 157 P.3d 431 (2007); *see also Blair v. GIM Corp. Inc*., 88 Wn. App. 475, 945 P.2d 1149 (1997). In light of the specific requirements of a CR 11 order found in *MacDonald v. Korum Ford* the inadequacies of the February 17, 2017 order self-evident, it states only **"[this] court additionally GRANTS Defendants' requires for CR 11 Sanctions and awards Defendants $ 25, 528.91," nothing more.** Plaintiff filed a motion for a request for a proper order, following this testy exchange the court refused to clarify its order to comply with the requirements found in *MacDonald v. Korum Ford:*

> MR. HERSCHENSOHN: Your Honor, I have a -- there is two parts of this motion. Obviously, there's the motion to reconsider and then the request for a more specific order; and I have prepared a proposed order, I provided to Counsel, that provides more specificity so that we can know which pleadings that we're not compliant with CR 11 and when the timing of those things took place. And I'm just presenting this and making it a part of the record.
>
> THE COURT: The Court made its ruling. There is a record already made. I'm not inclined to go back after the February 17th date to make specific findings.
>
> MR. HERSCHENSOHN: Okay. And there is, you know, obviously, support in Korum for an order, and in many of the cases that I cited, for a specific order that pertains specifically to the particular pleadings which is not something that we found here.

> THE COURT: Counsel, I don't see how you can prepare specific findings when you haven't even reviewed the hearing by way of a court transcript to prepare those; so I'm not inclined to sign them.
>
> MR. HERSCHENSOHN: Okay. So I would propose that on a motion for summary judgment, the pleadings are, primarily, the thing that goes up on appeal. Thank you, Your Honor.

The February 17, 2017 order which was issued by the court amounted to two sentences finding a CR 11 violation and awarding fees. This is inadequate to satisfy the requirements for a proper order. *See Biggs II* at 193; *Just Dirt Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431 (2007); *see also Blair v. GIM Corp. Inc.*, 88 Wn. App. 475, 945 P.2d 1149 (1997).

4. System Requires Advocacy

The purpose of CR 11 sanctions is to deter truly bad conduct by the attorneys; it is not intended, to create a cottage industry for lawyers. There is no support under Washington law and jurisprudence, or federal law and jurisprudence to support the implication of a fee shifting application of CR 11. Attorneys are supposed to take risks on behalf of their clients; they are supposed to push the envelope. This is the lifeblood of Anglo-Saxon jurisprudence; the adversarial system. Aggressive litigation is necessary to arrive at a just conclusion for the litigants.

Washington CR 11's and its federal counterpart's purpose is to deter baseless filings; it is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. *Salvador v. Momah*, 145 Wn. App. 365, 403, 186 P.3d 1117 (2008) (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 219). This entire system is undermined if attorneys are personally sanctioned for simply pressing their case hard to get a good result for his client.

In this case, Mr. Johnson's left leg was amputated because of the accident which was the subject of this case. His attorneys had an obligation to press hard, *to advocate* on his behalf. This includes amending the complaint when new potential claims arise, and filing summary judgments where the facts support the claims. Litigation is not for the faint of heart.

A careless imposition of CR 11 is extremely harmful to the practice of law. Monetary sanctions such as those imposed here, are against the attorney. Once the sanctions are imposed, the damage is done and cannot be quickly undone. Plaintiff's attorneys take injury (and other challenging cases) on a contingency basis. They front the costs, pay salaries for employees of the firm, expend their own time without pay, they take a tremendous risk. The Ninth Circuit made the astute observation

of the potential deleterious effect of the cavalier imposition of CR 11 sanctions:

> Were vigorous advocacy to be **chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights**. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.
>
> *Townsend v. Holman Consulting Corp*., 929 F.2d 1358, 1363-64 (9Cir.1990) (emphasis added)

F. CONCLUSION

There are real public policy concerns to allowing the imposition of CR 11 in contexts such as this one. CR 11 is not supposed to be used as "another weapon in the litigator's arsenal." *Biggs* at 199 n.2., this is exactly how the rule would come to be used if it was routinely imposed in the manner that it was imposed here against the attorneys.[27] This type of sanction represents a real threat to the proper adjudication of future cases and the ability for residents of Washington State to obtain competent legal representation. This is particularly the case where there are challenging facts or uncertain law.

[27] The facts in this case strongly infer that this whole matter was little more than litigation gamesmanship predicated by the reputation of the trial judge with regard to the imposition of attorney sanctions.

Here, the denial of due process and the abuse of discretion work hand in glove to result in an improper application of the rule. The court abused its discretion and the court should reverse the finding of a violation and the imposition of sanctions; alternatively the court may remand to the trial court for hearings further due process and the issuance of a specific order.

DATED this 14th day of September, 2017.

Respectfully submitted,

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APPENDIX

RULE CR 11 SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;
(2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is well grounded in fact;

(2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

FRCP 11. SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATION TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

> (1) How Initiated.
>
> > (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing

on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery.

Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26

through 37.for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

CERTIFICATE OF SERVICE

I, Stacy R. Ramsdell, certify under penalty of perjury under the laws of the State of Washington that on the 14th day of September, 2017, I caused to be served a true and accurate copy of the foregoing document upon the following persons via the means below stated:

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DATED this 14TH day of September, 2017.

By:_____
Stacy R. Ramsdell

THORTON MOSTUL HERSCHENSOHN

September 14, 2017 - 3:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50561-4
Appellate Court Case Title:	Nathan Scott Johnson, Appellant v City of Tacoma, PUD, Tacoma Rail, Respondents
Superior Court Case Number:	15-2-14412-5

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